



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

PIEDMONT REGIONAL OFFICE

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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Gerard Seeley, Jr.
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO EVERGREEN DEVELOPMENT COMPANY, L.L.C.

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and Evergreen Development Company, L.L.C. for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order and Appendix A attached hereto.

6. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
7. "Corps" means the U.S. Army Corps of Engineers.
8. "Evergreen" means Evergreen Development Company, L.L.C. certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
9. "Regional Shopping Center" means the Regional Shopping Center and Office Park which is located in Gloucester County at the intersection of Rt. 17 and Rt. 17 business.

SECTION C: Findings of Fact and Conclusions of Law

1. On December 16, 1997, DEQ issued VWP Permit No. 96-1814 (the Permit) to Robert Kubicki for the construction of a commercial development of approximately 120 acres for the Regional Shopping Center and Office Park in Gloucester County. The project proposed to impact 5.3 acres of forested wetlands. To mitigate for the loss of wetlands, a restrictive covenant (herein referred to as the Protective Instrument) was established on 62.34 acres of property in the Fox Mill Run drainage basin, which provided for the restriction, protection or preservation of this mitigation area. The Protective Instrument states that no activity will be allowed in the preserved area that involves the discharge of dredge or fill material unless authorized by DEQ. The Protective Instrument was recorded in the Clerk's Office of Gloucester County on February 9, 1998 and is an enforceable provision of the Permit.
2. The Permit was modified on November 6, 2000, to reflect a change in ownership from Robert Kubicki to Evergreen Development Company, L.L.C. The Permit was again modified and reissued on January 30, 2003, to address additional impacts of 0.9 acres of wetlands for the construction of utility and road crossings. The Permit will expire on January 30, 2010.
3. On October 20, 2004, DEQ staff met with the County and U.S. Army Corps of Engineers at the Regional Shopping Center to investigate a report of impacts to the preserved wetlands. DEQ staff observed that the dam of the storm water management pond located behind the shopping center had collapsed resulting in the discharge of storm water, sediment from the pond, soil and riprap from the wall of the dam into the preserved wetlands and tributary to Fox Mill Run located below the dam.
4. During the October 20, 2004 site visit, the Corps determined that the preserved wetland area had unauthorized fill that extended for approximately 500-600 linear feet of stream/wetlands. It has been estimated that approximately 1.3 acres of state waters and wetlands in the preserved area were filled. The fill depth in the preserved wetland area was measured to range from 26 inches to 1 inch.

5. On February 11, 2005, DEQ conducted another site visit with the County and Corps to assess remediation of the preserved wetlands.
6. On May 3, 2005, DEQ staff and the County met at the site with consultants and contractors hired by Evergreen to discuss the schedule for rebuilding the storm water management pond wall and to discuss restoration of the preserved wetlands.
7. DEQ issued a Notice of Violation (NOV) to Evergreen on May 3, 2005, for the unauthorized fill of preserved wetlands (Part I.A.1 of the Permit); for failure of the outfall/overflow structure of the storm water management pond resulting in downstream deposition of sediment (Part I.I.2); for failure to comply with the Protective Instrument for the preserved wetlands (Part I.J.1); and for failure to notify DEQ of the unauthorized impacts to State waters and wetlands (Part I.A.3).
8. DEQ requested and received a corrective action plan to restore the site. By letter dated July 12, 2005, DEQ conditionally approved the corrective action plan and schedule.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Evergreen, and Evergreen voluntarily agrees, to perform the actions described in Appendix A of this Order; and to pay a civil charge of \$8,100.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note the Federal Identification Number for Evergreen. Payment shall be by check, certified check, money order, or cashier's check payable to "Treasurer of Virginia" and sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Evergreen, for good cause shown by Evergreen, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the NOV issued on May 3, 2005 as listed in section C above. This Order shall not preclude the Board or the Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; and/or (3) taking subsequent action to

enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.

3. For purposes of this Order and subsequent actions with respect to this Order, Evergreen admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. Evergreen consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Evergreen declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by Evergreen to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Evergreen shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Evergreen shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Evergreen shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and Evergreen. Notwithstanding the foregoing, Evergreen agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

a. Evergreen petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

b. The Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Evergreen.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Evergreen from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Evergreen voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of March 16, 2006.


David K. Paylor, Director
Department of Environmental Quality

Evergreen voluntarily agrees to the issuance of this Order.

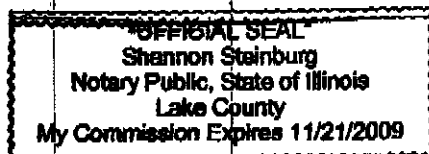
By: Robert Kubicki
Date: 12/23/05

Commonwealth of Virginia Illinois
City/County of Lake

The foregoing document was signed and acknowledged before me this 23rd day of
December, 2005, by Robert Kubicki, who is
(name)
Manager of Evergreen, on behalf of Evergreen
(title)

Shannon Steinburg
Notary Public

My commission expires: 11-21-09



APPENDIX A

Evergreen shall:

1. The restoration plan and schedule, as conditionally approved by DEQ letter dated **July 12, 2005**, is incorporated herein by reference.
2. **By no later than November 1, 2005**, submit to DEQ, PRO for approval, a date by which the restoration activities to restore the preserved wetland area shall be completed.
3. **By no later than December 31, 2006 and December 31, 2007**, submit to DEQ, PRO, the wetland restoration monitoring reports per the conditionally approved plan and schedule and DEQ letter dated July 12, 2005.
4. If the success criteria for the restoration of the wetlands is not achieved by the second year of monitoring per the DEQ letter dated July 12, 2005, submit to DEQ, PRO an approvable corrective plan with the **December 31, 2007** report.